

No. 17590

*Jul 31 1972*

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

JOHN M. SHUBIN and PETER S. SHUBIN,

Petitioners,

vs.

THE UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF CALIFORNIA,  
CENTRAL DIVISION; THE HONORABLE  
WILLIAM M. BYRNE, Judge of the United States  
District Court for the Southern District of California,  
Central Division, and S. VINCEN BOWLES, INC.,

Respondents.

---

REQUEST FOR  
RECONSIDERATION AND REHEARING

---

WILLIAM DOUGLAS SELLERS  
510 Citizens Bank Building  
16 North Marengo Avenue  
Pasadena 1, California

Attorney for Petitioners  
John M. Shubin and Peter S. Shubin



No. 17590

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

JOHN M. SHUBIN and PETER S. SHUBIN,

Petitioners,

vs.

THE UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF CALIFORNIA,  
CENTRAL DIVISION; THE HONORABLE  
WILLIAM M. BYRNE, Judge of the United States  
District Court for the Southern District of California,  
Central Division, and S. VINCEN BOWLES, INC.,

Respondents.

---

REQUEST FOR  
RECONSIDERATION AND REHEARING

---

WILLIAM DOUGLAS SELLERS  
510 Citizens Bank Building  
16 North Marengo Avenue  
Pasadena 1, California

Attorney for Petitioners  
John M. Shubin and Peter S. Shubin



IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

JOHN M. SHUBIN and PETER S. SHUBIN,

Petitioners,

vs.

THE UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF CALIFORNIA,  
CENTRAL DIVISION; THE HONORABLE  
WILLIAM M. BYRNE, Judge of the United States  
District Court for the Southern District of California,  
Central Division, and S. VINCEN BOWLES, INC.,

Respondents.

---

REQUEST FOR  
RECONSIDERATION AND REHEARING

---

To the Honorable, The Chief Judge and Associate Judges of  
the United States Court of Appeals for the Ninth Circuit:

The petitioners in the above matter respectfully request this  
Honorable Court to reconsider its decision of January 31, 1963,  
after remand by the Supreme Court, upon the Shubin petition for  
writ of mandamus or other relief, and to grant rehearing upon the  
following grounds:

Ground 1: The Court of Appeals has twice denied the Shubins'  
petition for writ of mandamus, once before the granting of certiorari  
by the Supreme Court and once after. According to this Court's  
own statement its consideration was directed to different subject  
matter in the two decisions. According to this Court's own state-



ment it failed in both considerations to face a primary issue raised and urged by petitioners.

This Court, according to its own statement of the scope of its consideration, did not face or determine the issue of whether petitioners were entitled to a jury trial upon the issues raised by the complaint for declaratory relief and the answer thereto alone, a jury trial having been properly demanded, and whether if that right did exist, it was waived by the filing of a compulsory counterclaim.

This Court did not pass upon that question, yet it is the basic issue raised.

According to its own statements the issues considered in the two decisions were as follows:

First decision dated December 29, 1961 (par. 1):

"Before us is a petition for Mandamus to require the district court to grant petitioners a jury trial on certain issues raised by a proposed amended counterclaim. "

Second decision dated January 31, 1963:

"This is a petition for Writ of Mandamus requiring the District Court to grant petitioners a jury trial on certain issues raised by an existing, and a proposed amended, counterclaim. " (Decision, par. 1).

and

"Petitioners' second position is that they are entitled to a jury on the issue raised by the complaint and the original counterclaim already on file. " (Decision, par. 2).

The basic issue was never "issues raised by a proposed





amended counterclaim", as stated in the first decision. That proposed counterclaim had not been filed. The proposal to file that "amended counterclaim" raised only the issue of petitioners' right to file it. The basic issue of petitioners' right to a jury trial upon the issues raised by the filed complaint and answer remained no matter what happened to the "proposed amended counterclaim". That question was ignored by the first decision though clearly raised in the petition.

The second decision, that following remand by the Supreme Court and dated January 31, 1963, and as quoted above, states the issues to be "certain issues raised by an existing, and a proposed amended, counterclaim" and "the issue raised by the complaint and the original counterclaim", is closer by far than the alleged issues stated in the first decision but still misses the point.

Not the issues raised by "existing" or "proposed amended, counterclaim", not the issues raised "by the complaint and the original counterclaim", but: Is the right to a jury trial as to issues raised by a complaint for declaratory relief and the answer lost by the filing of a compulsory counterclaim?

That is the issue. This Court has not faced that issue squarely and it is the basic issue presented. It should, in order that the Supreme Court will know its position clearly, for the importance of the rights involved will of necessity cause this matter to be resubmitted there.

Ground 2: The decision of this Court upon remand holds that a declaratory judgment action seeking no equitable relief is transformed into an action in equity by virtue of the presence of a



compulsory counterclaim and in so holding is in error in each of the following important respects:

- a. It ignores the law that a declaratory judgment action is neither legal nor equitable; and
- b. It ignores the basic rule that a jury trial properly demanded is to be denied only under "imperative circumstances".
- c. It ignores the basic concept that the filing of a compulsory counterclaim cannot be considered as a waiver of a right of jury with respect to issues raised in other pleadings as to which a jury has been properly demanded.

Ground 3: The decision of this Court upon remand is incompatible with the spirit and the law of Beacon Theatres and Dairy Queen which recognize the right to a jury trial properly demanded upon jury issues is to be denied only under "imperative circumstances", and in accepting as "imperative circumstances" circumstances which are in no sense "imperative" comprising:

- a. The presence of a compulsory counterclaim;
- b. The request for an accounting in the compulsory counterclaim when everyone admits there is nothing to account for;
- c. The request for an injunction in the compulsory counterclaim which also clearly is not needed for the same reason the accounting is not needed.

Ground 4: The decision of this Court upon remand ignores the fact the issues of validity and infringement are suitable for a jury under United States v. Esnault-Pelterie, 299 U.S. 201, 205, that a jury trial was demanded as to those issues raised by the complaint and answer, and that the filing of a compulsory counterclaim does



not effect a waiver of that demand.

Ground 5: This Court obviously erred in holding that there "can be no adequate remedy at law" (penultimate paragraph of decision) in the present case where the remedy at law is fully adequate as to the complaint and answer for which a jury trial has been demanded.

For each of the above reasons or grounds, this Court is respectfully requested to reconsider and rehear this case.

Respectfully submitted,

/s/ W. D. SELLERS

WILLIAM DOUGLAS SELLERS

Attorney for Petitioners  
John M. Shubin and Peter S. Shubin

### CERTIFICATE

I hereby certify that in my judgment the foregoing Request for Reconsideration and Rehearing is well founded and is not interposed for delay.

/s/ W. D. SELLERS

WILLIAM DOUGLAS SELLERS

